In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 854

MARVIN FEINBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On April 19, 1966, petitioner was convicted by a jury in the United States District Court for the Southern District of New York of knowingly transporting a stolen vehicle in interstate or foreign commerce, in violation of 18 U.S.C. 2 and 2312, and conspiracy to commit such offense. He was sentenced to imprisonment for a period of one year and a day on the substantive count. Imposition of sentence on the conspiracy count was suspended and petitioner was placed on probation for two years to run consecutively to the sentence on count 1. The court of appeals unanimously affirmed the judgment on July 31, 1967. A petition for rehearing was denied on August 25, 1967. The petition for a writ of certiorari was filed

November 24, 1967—61 days out of time under Rule 22 of the rules of this Court.[1]

In any event, there is no merit to the contentions urged in the petition. The record shows that in late 1959 petitioner and co-defendant Damsky were joint owners of an automobile driver school and an automobile rental company (R. 27–30). During January 1960, petitioner and Damsky were introduced to Frank Giampetruzzi at a local bar. Giampetruzzi told them he could fill their orders for any type of car for $1,000 to $1,200 each. Damsky requested him to supply them with a 1960 Lincoln Continental convertible (R. 27–34, 105–108).

On January 17, 1960, a 1960 Lincoln Continental convertible, purchased by Apex Specialty Distributors Corp. the previous month for $5,800 (list price

[1] Petitioner's counsel states that he did not learn of the denial of the petition for rehearing until November 10, 1967 (Pet. 2–4). We are informed that petitioner's present counsel, who entered the case after entry of judgment on July 31, 1967, and filed the petition for rehearing on August 14, 1967, did not file a motion for substitution of counsel or enter his appearance as attorney of record in the court of appeals until November 15, 1967. Consequently, the notice of the denial of the petition for rehearing was sent to petitioner's then attorney of record, Hyman Bravin. The clerk of the court of appeals plainly complied with customary practice. Moreover, contrary to counsel's intimated reliance on the New York Law Journal for notice, denials of petitions for rehearing are not reported in that publication.

Petitioner's reliance on *Commissioner* v. *Estate of Bedford*, 325 U.S. 283, for his suggestion that issuance of the mandate governs the time for filing a petition for a writ of certiorari (Pet. 4) is unwarranted under the present rules of the Second Circuit (See Rule 28). The time for filing the instant petition started to run upon denial of the petition for rehearing.

$7,200), was stolen (R. 7–10, 15–16, 22–24). The next day it was delivered to petitioner's business premises by John Newton, an associate of Giampetruzzi. Petitioner prepared a bill of sale, which stated that the car was free of any liens and accident claims, and which was executed by Newton before a notary public (R. 34–39, 81–100; Gov't Exh. 4). Damsky registered and insured the vehicle in his own name and obtained a $1,500 loan secured by the car (R. 42–43, 97–101). The proceeds of the loan were given to petitioner (R. 46). On April 20, 1960, title to the Lincoln was transferred to the automobile rental corporation (R. 42–43, 99–101; Gov't Exh. 5). In July 1960, Damsky took the Lincoln on a trip to Mexico. To facilitate border crossing, he took with him a statement signed by petitioner in his capacity as a corporate officer authorizing Damsky to drive the car (R. 60–64, 102–103; Gov't Exh. 6). Damsky was arrested shortly thereafter in Mexico City and returned to this country in custody (R. 60, 76–80, 129).

As bearing on knowledge and intent, the government introduced evidence showing that, shortly after receiving the Lincoln, Giampetruzzi's girl friend informed petitioner and Damsky that Giampetruzzi had been arrested and needed money for a lawyer (R. 49). Later, one Cioffi came to the automobile school offices, introduced himself to petitioner as a friend of Giampetruzzi, told petitioner he was in the business of selling stolen cars and offered to obtain any type of car for $1,000. Cioffi told petitioner that he needed counterfeit registration blanks, which he

had previously obtained from Giampetruzzi. Petitioner agreed to supply Cioffi with the counterfeit registration blanks and indicated he would buy some cars. Approximately three weeks later, petitioner sent a post card to Cioffi giving the combination of a post office box at a post office located not far from the automobile school. Cioffi went to the post office and took seven to ten counterfeit registration blanks out of the box (R. 46–48, 130–139, 161, 166–169). Thereafter, Cioffi sold a stolen 1959 Pontiac convertible to petitioner and Damsky (R. 54–55, 136, 172). There was also evidence of other transactions in stolen cars with Cioffi (R. 56–60, 139–140, 169–174, 178–180).

1. Petitioner contends that the delay of nearly five years between the commission of the offense and the return of the indictment violated his constitutional right to a prompt trial. Petitioner fails to observe that the delay complained of presents a problem quite different from that entailed by a delay following arrest and indictment. It has always been recognized that the latter sort of delay—occurring when the running of the statute of limitations has been tolled and the defendant has been incarcerated and subject to the obloquy of official accusation—involves grave dangers which are not present here. Conversely, this Court has observed that, where there has been pre-arrest delay, the statute of limitations "is usually considered the primary guarantee against bringing overly stale criminal charges." *United States* v. *Ewell*, 383 U.S. 116, 122. Indeed, there is substantial support for the view that the protection of the Sixth Amendment, like that of

Rule 48(b), F.R. Crim. P., is addressed exclusively to the post-arrest situation. See, *e.g.*, *Nickens* v. *United States*, 323 F. 2d 808 (C.A.D.C.); *Harlow* v. *United States*, 301 F. 2d 361 (C.A. 5), certiorari denied, 371 U.S. 814; *Parker* v. *United States*, 252 F. 2d 680 (C.A. 6), certiorari denied, 356 U.S. 964; *Foley* v. *United States*, 290 F. 2d 562 (C.A. 8), certiorari denied, 368 U.S. 888. In all events, we can find no support for the view that a defendant may assert pre-arrest delay as a bar to a prosecution commenced within the applicable period of limitations without demonstrating that he has been materially prejudiced thereby. See, *e.g.*, *United States* v. *Ewell*, 383 U.S. 116, 122; *Tynan* v. *United States*, 376 F. 2d 761 (C.A.D.C.); *United States* v. *Bennett*, 364 F. 2d 499, 500 (C.A. 2); *Harlow* v. *United States*, 301 F. 2d 361 (C.A. 5). Hence, without some showing of prejudice to the defense, there is no reason why the government should be called upon to explain, or a court required to consider, whether an indictment brought within the applicable limitations period could or should have been brought sooner.

The court of appeals found on the record here that there was no plausible claim of prejudice (Pet. App. 28–31). Petitioner bases his claim of prejudice exclusively on an asserted diminution of recall. However, the record references cited by petitioner (Pet. 12–13) show, and the court of appeals found (Pet. App. 30–31), that petitioner's recall, except for isolated instances when confronted with his prior inconsistent statement, was detailed and specific. Similarly, lapses of recall of government witnesses were minor and re-

lated to non-essential detail. Petitioner and Damsky both knew shortly after the offense that they were under serious investigation concerning a number of stolen cars, and their experiences during the investigation were likely to fix the events and circumstances concerning the 1960 Lincoln in their memory. Cf. *United States* v. *Ewell*, 383 U.S. 116, 122. Moreover, substantial documentation of the pertinent transactions and use of the vehicles was available to refresh the recollection as to dates, sequence of events and person involved. The record shows that the prosecution was solidly founded on reliable testimony supported by documentary evidence. There is thus no occasion for this Court to review the determination of the court below that the instant record established that the delay here was not prejudicial to the defense.

2. Petitioner's contention that he should have had a preliminary hearing outside the presence of the jury on the voluntariness of an exculpatory statement that he had given to police shortly after co-defendant Damsky was arrested in Mexico (Pet. 9–10, 16–19) is without merit.[2] Petitioner took the stand in his own de-

[2] We do not read the petition as suggesting that the finding of voluntariness by the judge and jury was not adequately supported by the record. In any event, the record does not reveal "a credible possibility" that the statement was coerced (Pet. App. 38). Petitioner testified on re-direct that the statement had been given after he had been questioned for about three hours by a detective of the New York City Police Department and after he had been provided with food and drink and allowed to communicate with his wife. He admitted that there had been no threats of physical harm and the most threatening thing said was that he was "in a lot of trouble" (R. 339–351). Petitioner never requested counsel. The trial took place prior to the decision in *Miranda* v. *Arizona*, 384 U.S. 436.

fense. On cross-examination, the government showed him the statement to refresh his recollection or, that failing, to impeach his direct testimony. The court declined to conduct a preliminary hearing outside the presence of the jury, but permitted petitioner to develop fully the circumstances surrounding the making of the statement on re-direct examination. The judge indicated that he regarded the statement as voluntary (R. 447–448) and submitted the issue to the jury under appropriate instructions requested by petitioner (A. App. 119a; G. App. 86a). While a preliminary hearing would have been desirable, the procedure followed here does not in the circumstances constitute reversible error. "This Court has never ruled that all voluntariness hearings must be held outside the presence of the jury, regardless of the circumstances." *Pinto* v. *Pierce*, No. 284, October 24, 1967. Petitioner has had an independent judicial determination that his statement was voluntary. The failure to hold a preliminary hearing did not prejudice his privilege to refuse to testify since he had already taken the stand when he was confronted with his statement on cross-examination. Thus, the purposes to be served by a preliminary hearing were not defeated here.

3. Cioffi testified concerning petitioner's participation in the purchase and registration of a stolen Pontiac in April 1960. That testimony was offered as bearing on the issue of intent and guilty knowledge. Petitioner had previously been acquitted in a State court of unlawfully receiving the Pontiac. Nevertheless, Cioffi s testimony clearly did not violate the double jeopardy clause, as petitioner urges, since the

two trials were prosecuted by different sovereigns for distinct offenses. *Abbate* v. *United States,* 359 U.S. 187. Nor is there any basis for concluding that Cioffi's testimony should have been excluded under the doctrine of collateral estoppel. The United States was not estopped by the State litigation to which it was not a party. Moreover, it does not appear that the State verdict "necesarily determined" the factual issue as to which Cioffi testified. See *Adams* v. *United States,* 287 F. 2d 701, 704–705 (C.A. 5); see also *Abbate* v. *United States,* 359 U.S. 187, 200 n. 4 (opinion of Mr. Justice Brennan); *Hoag* v. *New Jersey,* 356 U.S. 464, 471.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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